THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEANETTE PORTILLO, ALICIA COAKLEY, FREDDY BARAJAS, HERIBERTO VALIENTE, DAVID CONCEPCION, DANIEL KASSL, and DANIEL SMITH, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

COSTAR GROUP, INC., a Delaware corporation; STR LLC, a Delaware corporation, HILTON DOMESTIC OPERATING COMPANY, a Delaware corporation, HYATT CORPORATION, a Delaware corporation, SIX CONTINENTS HOTELS INC., a Delaware corporation, LOEWS HOTELS HOLDING CORPORATION, a Delaware corporation, MARRIOTT INTERNATIONAL, INC., a Delaware corporation, and ACCOR MANAGEMENT US INC., a Delaware corporation,

Defendants.

Case No. 2:24-cv-00229-RSL

DEFENDANTS' REPLY BRIEF IN SUPPORT OF JOINT MOTION TO DISMISS COMPLAINT

NOTE ON MOTION CALENDAR: August 28, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

I. INTRODUCTION

Plaintiffs' Opposition confirms that Plaintiffs have failed to plead a plausible Section 1 claim for at least three reasons.

First, the Opposition shows that Plaintiffs have not alleged any agreement ***among*** the Hotel Defendants. Plaintiffs argue that STR's terms and conditions are an "express, written," "give-to-get" agreement to exchange "reciprocal" "competitively sensitive information," Opp. at 1, 9, 11, 12,[1] but the actual substance of STR's terms conclusively show otherwise. STR's terms state that each participating hotel is to provide certain aggregated, non-price data to STR in order to receive STR's aggregated and anonymized benchmarking reports, ***not*** in exchange for any individual hotel's proprietary data. To infer a plausible conspiracy simply because the Hotel Defendants receive STR's benchmarking reports, as Plaintiffs essentially ask, would transform a multitude of benchmarking services across various industries into walking antitrust conspiracies.

Second, Plaintiffs fail to provide any authority holding that aggregated, anonymized, non-pricing data is competitively sensitive. Plaintiffs concede that STR's reports do not contain any pricing information. Indeed, despite the suggestion that STR provides "pricing information" or "room prices," Plaintiffs ultimately recognize that they have merely alleged that participating hotels provide STR with "hotel occupancy, rooms sold, and room revenue" data, *id*. at 20, none of which is pricing information. Plaintiffs also admit that the only prospective information that STR collects is "forward-looking occupancy data, including rooms available and rooms booked," *id.* at 26—not "forward looking price[s]." *Id*. at 5. Unable to plead an exchange of competitively sensitive information among the Hotel Defendants, Plaintiffs cannot plausibly allege a conspiracy or any anticompetitive effects.

Third, Plaintiffs abandon any argument that their claim relates to "price fixing." The Complaint recklessly labels STR's benchmarking reports "price fixing in its modern form," Compl. ¶ 1, but the Opposition does not attempt to defend that hyperbole. This case decidedly does ***not*** involve "price fixing," "pricing algorithms," or even the sharing of pricing information.

[1] "Opp." refers to Pls.' Opposition to Defs.' Joint Motion to Dismiss Complaint (Dkt. 103). "Mot." refers to Defs.' Joint Motion to Dismiss Complaint (Dkt. 91).

Instead, this case is about the use of benchmarking reports—a practice that is not *per se* illegal. Indeed, Plaintiffs ignore binding precedent showing that aggregated and anonymized benchmarking reports, like STR's, are procompetitive, do not raise antitrust concerns, and are insufficient to plausibly allege an unlawful conspiracy. *See* Mot. at 16 (citing *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 582-83 (1925); *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999)). That Plaintiffs have ***no response*** to this controlling authority confirms that their Complaint must be dismissed.

II. ARGUMENT

A. Plaintiffs Have Not Plausibly Alleged An Agreement Among Hotel Defendants

Plaintiffs do not dispute that they must adequately allege an agreement ***among Hotel Defendants*** in order to survive dismissal. *See* Opp. at 8-11. Their Opposition, however, confirms that Plaintiffs have failed to do so, whether through direct or indirect evidence.

1. Plaintiffs Have No Answers To *Kendall's* "Basic" Questions

Defendants explained that Plaintiffs failed to "answer the basic questions," *i.e.*, "who, did what, to whom (or with whom), where, and when," as articulated in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008), to plausibly allege an antitrust conspiracy. Mot. at 10-13. Plaintiffs respond that they need not satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading standard, Opp. at 3, 18-19, but Defendants never claimed *Kendall* imposed such a standard. Instead, *Kendall* reflects the "basic questions" that plaintiffs should address to plausibly allege an antitrust conspiracy. 518 F.3d at 1048. And, the Ninth Circuit regularly applies *Kendall* to affirm the dismissal of conclusory antitrust conspiracy claims like Plaintiffs'. *See In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 n.6 (9th Cir. 2015) ("plaintiffs must plead evidentiary facts: 'who, did what, to whom (or with whom), where and when'") ("*Musical Instruments*"); *In re Dynamic Random Access Memory Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 46 (9th Cir. 2022). Plaintiffs' failure to answer any of *Kendall's* questions confirms that their allegations are conclusory and insufficient to plausibly plead a conspiracy.

Who agreed with whom? Plaintiffs' allegation that "Hotel Operators" entered into the alleged conspiracy is exactly the type of vague allegation that courts have found insufficient. *See*

Gibson v. MGM Resorts, Int'l, 2023 WL 7025996, at *4 (D. Nev. Oct. 24, 2023) ("Hotel Operators" inadequate); *Bay Area Surgical Management LLC v. Aetna Life Insurance Co.*, 166 F. Supp. 3d 988, 995 (N.D. Cal. 2015) ("Defendant Insurers" too barebones); *see also* Mot. at 10-11.[2] And, Plaintiffs' argument that they provided "the names of several of the[] [Hotel Defendants'] high-level executives" who supposedly spoke publicly about their "use of data provided by STR" at a conference, Opp. at 20, is also irrelevant because none of those executives is alleged to have entered into any agreement or divulged any competitively sensitive information. *Cf. Musical Instruments*, 798 F.3d at 1196 ("mere participation in a trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement").

To do what? Plaintiffs argue that the alleged conspiracy was entered into through, and is reflected in, STR's terms and conditions for its benchmarking services. Opp. at 20. But the fundamental problem for Plaintiffs is that they misrepresent those terms. In reality, STR's terms state that a participating hotel will provide STR with its "Hotel Data"—*i.e.*, certain revenue and occupancy (but not price) data—and that STR will, in turn, provide that participating hotel with "Hotel Benchmarking Deliverables," *i.e.*, reports that compare that hotel's own data "against comparable and ***aggregated data*** provided by other Hotel Benchmarking Participants . . . and/or other comparable market data." Decl. of Steve W. Berman (Dkt. 104) ("Berman Decl."), Ex. A at 3 (emphasis added); *see also* Compl. ¶¶ 3, 99. STR's terms also make express that "no Hotel Benchmarking Deliverable shall directly or indirectly identify [the hotel] as the owner/provider of any specific data contained within the Hotel Benchmarking Deliverable." Berman Decl. Ex. A at 5-6. STR's terms thus do not suggest that what any hotel receives is "reciprocal" "competitively sensitive" information from any other hotel, and no hotel receives any other hotel's "Hotel Data." Instead, STR's terms confirm that participating hotels only receive benchmarking reports that aggregate and average anonymized data across the market or subset of other hotels. *See id.* at 3.

[2] Plaintiffs attempt to distinguish *Gibson* and *Bay Area Surgical* on the basis that those cases did not involve any "give-to-get information exchange agreement," Opp. at 20 n.86, but as discussed above, Plaintiffs have not plausibly alleged any agreement to exchange competitively sensitive information, which renders the supposed "give-to-get" irrelevant.

STR's terms thus undermine rather than support Plaintiffs' argument regarding the existence of a purported conspiracy. *See In re Local TV Adver. Antitrust Litig.*, 2022 WL 3716202, at *6-8 (N.D. Ill. Aug. 29, 2022) ("*Local TV Ads*") (refusing to infer unlawful conspiracy from benchmarking reports that included aggregated and anonymous data).

When? Plaintiffs also have no answer to "when" the alleged conspiracy was formed other than insisting "each Operator has [allegedly] been participating" in the conspiracy "since at least February 2020." Opp. at 21. But that allegation is insufficient. *See Gibson v. Cendyn Grp., LLC*, 2024 WL 2060260, at *3-4 (D. Nev. May 8, 2024) (dismissing, as implausible, allegations that hotels entered into agreement when they began using software "at different times over an approximately 10-year period").

Plaintiffs thus have not plausibly alleged any agreement, including because they have not answered *Kendall*'s "basic" questions.

2. STR's Terms Are Not Direct Evidence Of An Agreement

Plaintiffs argue that STR's terms and conditions are "direct" evidence of Hotel Defendants' agreement to "provide[] [their] sensitive pricing and supply information ***in exchange for*** receiving that same information from [] competitors." Opp. at 16 (emphasis in original). But, as explained above, that is not what STR's terms state, and they cannot plausibly be read to suggest that what any hotel receives in return is competitively sensitive information from its competitors. *See supra* at 3; *see also* Berman Decl. Ex. A at 3. STR's terms are not "smoking gun" evidence of an agreement ***among*** Hotel Defendants to exchange competitively sensitive information through STR.

Neither *United States v. Container Corp. of America* nor *Petroleum Products Antitrust Litigation*, which Plaintiffs rely on, suggest that STR's terms constitute "direct" evidence of a conspiracy. *See* Opp. at 7, n.17. In *United States v. Container Corp. of America*, competing container suppliers directly "exchange[d] information concerning specific sales to identified customers" and "the most recent price charged or quoted . . . ." 393 U.S. 333, 334-35 (1969). And, in *Petroleum Products Antitrust Litigation*, there were direct exchanges of "price information" between competing oil companies and defendants admitted that their pricing

announcements served "no purpose" other than to ensure "competitors could quickly learn of, and respond to" the price changes. 906 F.2d 432, 446, 453 (9th Cir. 1990). In neither case did the court infer an express horizontal agreement among "spokes" based solely on bilateral agreements between the "hub" and each "spoke."

Plaintiffs' only other supposed "direct" evidence are their allegations that hotels "use[] STR reports in their operations" and that the Hotel Defendants' employees "tout using STR reports" as part of their jobs. Opp. at 10. But receipt or use of STR's reports is not direct evidence of an illicit agreement among the Hotel Defendants to exchange competitively sensitive information. *See Honey Bum, LLC v. Fashion Nova, Inc.*, 63 F.4th 813, 822 (9th Cir. 2023) (rejecting supposed "direct" evidence that did not establish a conspiracy "without . . . any inferences"). Hotel Defendants' mere use of STR establishes, at most, a series of unilateral agreements between each individual Hotel Defendant and STR, not an agreement between Hotel Defendants.

Plaintiffs' allegations also bear no resemblance to the alleged conspiracies at issue in the *United States v. Gypsum*, *Moehrl v. National Association of Realtors*, or *Epic Games, Inc. v. Apple, Inc.* cases upon which Plaintiffs rely. *See* Opp. at 8-9. In *United States v. Gypsum*, a patent licensor entered into patent licensing agreements with licensees that, on their face, "fix[ed] minimum prices." 340 U.S. 76, 83 (1950). The allegedly illegal agreement was between the patent licensor and the licensees, not among the licensees. *See id.* In *Moehrl v. National Association of Realtors*, the National Association of Realtors ("NAR") issued express buyer-broker commission rules that local realtor associations and realtor companies enforced. *See* 492 F. Supp. 3d 768, 774 (N.D. Ill. 2020). The allegedly illegal agreement was between NAR and realtor associations and companies, not among the realtor associations and companies. *Id.* at 777-78. And, in *Epic Games, Inc. v. Apple*, the Ninth Circuit held only that the district court erred when it held that "a non-negotiated contract of adhesion" like Apple's Developer Program Licensing Agreement, fell outside the scope of Section 1. 67 F.4th 946, 981-82 (9th Cir. 2023). Those cases stand for the unremarkable proposition that evidence of an express agreement can satisfy the agreement prong of Section 1. That principle does not cure Plaintiffs' failure to plead ***any*** agreement among the

Hotel Defendants.

3. There Is No Indirect Evidence Of A Conspiracy

a. Plaintiffs Do Not Allege A Hub-And-Spoke Conspiracy

Plaintiffs also argue that they have sufficiently pled a hub-and-spoke conspiracy because STR supposedly advertises that its benchmarking services "exist[] to give a participating hotel access to its competitors' price and occupancy data" and that the Hotel Defendants "accept[] STR's invitation by subscribing to STR's services," and know "of each other's participation in STR." Opp. at 12. Embedded in this argument is an unsupported inference that "benchmarking" means the illicit exchange of competitively sensitive information. *See id.*; *see also* Compl. ¶ 76. Stripped of innuendo and mischaracterization, Plaintiffs only allege that participating hotels provide STR with certain revenue and occupancy data in order to receive an aggregated, averaged, and anonymized benchmarking report that allows hotels to compare their performance to that of a set of competitors or the wider market. *See* Mot. at 4-6; *see also* Compl. ¶¶ 69, 75, 134. That does not plausibly imply a conspiracy. Nor does the fact that Hotel Defendants allegedly know which other hotels receive STR's reports. *See* Mot. at 16-17.

Plaintiffs rely on *Olean* to argue that they have sufficiently pled a hub-and-spoke conspiracy based on the Hotel Defendants' receipt of STR's reports, *see* Opp. at 12-13, but the underlying facts in *Olean* are not analogous. In *Olean*, the plaintiffs alleged that turkey "prices increased dramatically" following turkey producers' exchange of detailed and company-specific information regarding their "profits, prices, costs, and production levels" through an industry analyst, Agri Stats. *Olean Wholesale Grocery Coop., Inc. v. Agri Stats, Inc.*, 2020 WL 6134982, at *1-3 (N.D. Ill. Oct. 19, 2020). Judge Kendall in the Northern District of Illinois held that the plaintiffs had sufficiently alleged a conspiracy based on turkey producers' contribution of data to, and receipt of reports from Agri Stats, because the turkey producers knew which other producers were providing their competitively sensitive data ***and*** "could decipher the data pertaining to each producer" in Agri Stats' reports, which were only superficially anonymized. *Id.* at *6. Here, however, Plaintiffs do not and cannot allege that any individual hotel— much less all of them— deciphered any other individual hotel's specific data. That failure is fatal to Plaintiffs' claim.

Rather, the circumstances here are analogous to a subsequent case before Judge Kendall—*Local TV Ads*—in which the plaintiffs alleged that the defendant, Sharebuilders, had facilitated the exchange of competitively sensitive market information among local TV stations. 2022 WL 3716202, at *2. The plaintiffs attempted to allege a hub-and-spoke conspiracy predicated on the fact that Sharebuilders provided the TV station defendants with benchmarking reports concerning their competitors' data, including pricing recommendations and "weekly bottom" prices. *Id.* at *2-3. Judge Kendall explained that "to plausibly infer that a defendant *facilitated* a conspiracy, plaintiffs must allege facts showing that the conduit's circulation of information enabled co-conspirators to tacitly communicate with one another," and there must be "concrete allegations that the conduit-defendant compromised the ostensible anonymity of competitively sensitive information . . . ." *Id.* at *6 (internal citation omitted). In dismissing the plaintiffs' claims against Sharebuilders, Judge Kendall distinguished *Olean*, holding that the information provided in Sharebuilders' reports "lack[ed] sufficient granularity" and, because it was "aggregate[d]" and "anonymous," did not allow the broadcaster defendants to "monitor specific competitors' activity" or "tacitly communicate," like the Agri Stats reports in *Olean*. *Id.*

As in *Local TV Ads*—a case Defendants cited in their Motion and Plaintiffs ignore—the information that Plaintiffs allege STR disseminates in its reports is "aggregated" and "anonymized." Compl. ¶ 134; *see also* Opp. at 5 ("STR anonymizes data in its reports"). And, while Plaintiffs speculate that "based on a strategic selection of custom cuts, some hotels ***could*** deanonymize" STR's data by "partner[ing] with another hotel," Compl. ¶ 22 (emphasis added), the Complaint does not allege that any hotels have ever deanonymized STR's data, or even attempted to do so.[3] As in *Local TV Ads*, and unlike in *Olean*, there are no plausible or "concrete" allegations that the Hotel Defendants "monitor" specific competitor's activities or "tacitly communicate" with one another through STR's reports.

Plaintiffs also rely on *Interstate Circuit Inc. v. United States*, *United States v. Apple, Inc.*, and *Meyer v. Kalanick* to support their argument that they have plausibly pled a conspiracy, Opp.

[3] Indeed, Plaintiffs' allegations recognize that an individual hotel cannot deanonymize data in STR's reports, but instead, must engage in a separate, unalleged conspiracy to do so. *See* Compl. ¶ 22.

at 11-13, but those cases are inapposite too, not least because they are price-fixing cases where the "hub" (*i.e.*, Interstate, Apple, and Uber) had demanded that the "spokes" (*i.e.*, movie distributors, book publishers, and drivers) charge a certain price or adopt a pricing policy. The courts in each of those cases inferred a hub-and-spoke conspiracy because each spoke knew to whom the hub had made the pricing demand, and without uniform action by the spokes, there was a risk of substantial loss of business or goodwill. *See Interstate Cir. v. United States*, 306 U.S. 208, 222 (1939) (inferring conspiracy because distributors accepted Interstate's terms and were aware that "without substantially unanimous action . . . there was a risk of a substantial loss of . . . business and good will"); *United States v. Apple, Inc.*, 791 F.3d 290, 314-19 (2d Cir. 2015) (sufficient allegations of conspiracy because Apple "assure[d] [the publishers] that they weren't going to be alone" and would not face "retribution" if they adopted Apple's pricing model); *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 822–24 (S.D.N.Y. 2016) (sufficient allegations of conspiracy because "[w]ithout the assurance that all drivers will charge the price set by Uber . . . adopting Uber's pricing algorithm would often not be in an individual driver's best interest . . . [and] result in lost business opportunities"). There are no similar allegations here. Plaintiffs do not allege that STR makes any pricing recommendations or is involved with hotel room pricing at all, nor do they allege that any hotel risks "substantial loss" or "retribution" of any kind if it does not participate in STR's benchmarking services. None of Plaintiffs' cases suggest that a conspiracy can be inferred on the facts Plaintiffs allege.

b. Plaintiffs Do Not Allege Parallel Conduct

Plaintiffs contend that they have sufficiently alleged parallel conduct because all of the Hotel Defendants provide data to STR in order to receive a benchmarking report, and because their "preliminary economic analysis" supposedly shows "parallelism" in Defendants' pricing. *See* Opp. at 13-14. Plaintiffs are wrong on both counts.

First, Plaintiffs' argument for parallelism is, at bottom, that all of the Hotel Defendants have, over the course of at least the last four years, been STR customers. *Id.* But that is not enough. Indeed, the *Gibson* court rejected the same arguments Plaintiffs make here, as well as their backup argument that annual licensing renewals somehow constitute parallel conduct. *See*

Gibson, 2024 WL 2060260, at *3-4 (rejecting plaintiffs' argument of "parallel use" of defendant's software, and finding that hotels' licensing decisions spread out over "approximately 10-year period" did "'not raise the specter of collusion'"); *Musical Instruments*, 798 F.3d at 1195-96 (slow adoption of similar policies over several years "does not raise the specter of collusion").[4]

Second, parallel conduct cannot be inferred from Plaintiffs' "preliminary economic analysis." Plaintiffs claim that their analysis shows "highly correlated parallel pricing movement." Opp. at 14. But Plaintiffs make no effort to respond to the multitude of flaws with their "analyses" that Defendants identified. *See* Mot. at 14-15, 19-21; *see also infra* at 12. The Court need not credit "charts and analysis," like Plaintiffs', "that are as consistent with parallel, market-following behavior," nor is it "bound to accept unwarranted inferences." *RealPage*, 2023 WL 9004806, at *14 (rejecting allegations of parallel pricing based on preliminary economic analysis).

c. Plaintiffs Do Not Allege Any Plus Factors

Plaintiffs also fail to allege any "plus factors" from which an agreement among the Hotel Defendants could plausibly be inferred.

Action against self-interest. Plaintiffs argue that the Hotel Defendants acted against their self-interest by exchanging competitively sensitive information through STR, and that there would be no reason for the Hotel Defendants to provide their information to STR absent a "give-to-get" agreement. Opp. at 15-16. But Plaintiffs' argument rests on the falsehood that STR's reports provide the Hotel Defendants with their competitors' competitively sensitive information, which is not what the Complaint alleges or what STR's terms provide. *See supra* at 1, 3-4.

Plaintiffs have ***no response*** to the cases that Defendants cite confirming that the Supreme Court and the Ninth Circuit have recognized the legitimate and pro-competitive motivation of businesses to receive market-level benchmarking data. *See* Mot. at 16 (citing *Maple Flooring Mfrs.' Ass'n*, 268 U.S. at 582-83; *In re Citric Acid Litig.*, 191 F.3d at 1098). Instead, Plaintiffs

[4] Plaintiffs' reliance on *In re RealPage, Inc. Rental Software Antitrust Litig. (No. II)*, 2023 WL 9004806 (M.D. Tenn. Dec. 28, 2023) ("*RealPage*"), is of no help either. There, the court found that the plaintiffs had alleged parallel conduct because the defendants' pricing strategies had all changed when they started using RealPage's software. *See id.* at *12-13. Plaintiffs have alleged no comparable change in the Hotel Defendants' behavior once they became STR customers.

cite inapposite cases. *See* Opp. at 15. Both *American Column & Lumber Co. v. United States* and *Flextronics International USA v. Panasonic Holdings Corp.* involved direct exchanges of proprietary data between competitors. *See Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 410 (1921) (competitors directly exchanged "daily, weekly, and monthly reports of the minutest details"); *Flextronics Int'l USA, Inc. v. Panasonic Holdings Corp.*, 2023 WL 4677017, at *3 (9th Cir. July 21, 2023) (competitors directly exchanged "firm-specific, forward-looking, and confidential information" in "private meetings"). *RealPage* is even further removed from the facts of this case because it involved allegations of competing multifamily real estate companies providing their nonpublic pricing and output data to a common software provider in order to receive pricing recommendations that relied on competitors' proprietary data. 2023 WL 9004806, at *15-16, 21-22.

Purported efforts to monitor compliance. Plaintiffs argue that STR is somehow "monitoring" hotels' compliance by ensuring that hotels provide "accurate" and "timely" data, and by telling hotels whether they are getting their "'fair share' of price." Opp. at 17. But Plaintiffs' Complaint does not allege, and the Opposition does not explain, how "accurate" and "timely" data submissions that are processed into aggregated and anonymized benchmarking reports could allow any Hotel Defendant to "monitor compliance," "detect 'cheating,'" or otherwise impose "disciplinary measures." *Id.*

In addition, this case is nothing like the *In re Broiler Chicken Antitrust Litigation* case. *See id.* (citing 290 F. Supp. 3d 772, 788 (N.D. Ill. 2017) ("*Broilers*")). As in *Olean*, *Broilers* involved plausible allegations that Agri Stats' reports breached anonymity and provided proprietary production information that chicken producers allegedly admitted using to coordinate their own production levels. *Id.* at 781, 800. The *Broilers* court found that the plaintiffs had alleged Agri Stats' reports could be used to "communicat[e]" and "monitor" compliance because they were "so detailed that a reasonably informed producer [could] discern the other producers' identities, and it [was] common knowledge among producers that this [was] possible." *Id.* at 781, 800. STR's reports, in comparison, only provide aggregated and anonymous data, which does not plausibly allow Hotel Defendants to communicate or monitor each other's pricing decisions. *See* Mot. at 6;

see supra at 3-4, 7.

Market structure. Plaintiffs' allegations of market concentration, significant barriers to entry, that luxury hotel rooms are fungible, and that demand for luxury hotel rooms is inelastic are conclusory and contradicted by Plaintiffs' other allegations. *See* Opp. at 24-26; Mot. at 25-28. Regardless, allegations regarding the structure of the "luxury hotel market" are insufficient to allow the Court to infer collusion without more. *See, e.g.*, *Musical Instruments*, 798 F.3d at 1189 (market structure allegations are "no more consistent with an illegal agreement than with rational and competitive business strategies").

Motive and opportunities to conspire. Plaintiffs contend that STR's Hotel Data Conference serves as a "platform for STR to educate its audience about how to use data to drive up hotel room prices" and that the Hotel Defendants and their alleged co-conspirators attend the conference and "shar[e] their views on hotel pricing." Opp. at 17-18. But, at most, all Plaintiffs have actually alleged is that speakers at STR's conference discuss industry trends and general management strategies. Compl. ¶¶ 18-19, 119-21. There are no allegations that Defendants have shared or discussed any competitively sensitive information at STR's conference. *See In re German Auto. Mfrs. Antitrust Litig.*, 392 F. Supp. 3d 1059, 1071-72 (N.D. Cal. 2019) (holding insufficient allegations that vaguely asserted defendants participated in industry "working groups and trade associations," but "almost never identif[ied] what was [allegedly] agreed to in these meetings").

Whether considered collectively or individually, Plaintiffs have failed to allege any plus factors that could push any parallel conduct—of which there is none—over the line to the realm of a plausible conspiracy.

B. Plaintiffs Fail To Plausibly Allege Any Anticompetitive Effects

Plaintiffs' claim fails for the independent reason that they do not adequately allege the purported conspiracy had any anticompetitive effects.

1. Plaintiffs' Preliminary Economic Analysis Is Not Direct Evidence Of Anticompetitive Effects

Plaintiffs' "preliminary economic analysis" is meaningless because Plaintiffs obscure the

data by using future (not ***actual***) hotel prices, aggregated across "15 Major US Cities" (none identified as alleged submarkets), for four months in 2024, and do not distinguish prices from hotels that use STR's reports versus those that do not. *See* Mot. at 19-21. Plaintiffs' Opposition does not address ***any*** of these deficiencies. *See* Opp. at 30-32. Instead, Plaintiffs argue they are entitled to a free pass prior to discovery, and that the Court must accept their characterization of the economic analysis they have presented. *See id.* at 31-32. But that is wrong, and the Court need not "accept . . . unwarranted inferences" when considering Plaintiffs' supposed economic analysis. *RealPage*, 2023 WL 9004806, at *14; *see also id.* at *33-34 (rejecting similar economic analysis that relied on aggregate pricing data from only four defendants in four submarkets for a single month).

2. Plaintiffs Fail To Allege Anticompetitive Effects Through Indirect Evidence

Plaintiffs instead fall back on their allegations that the nature of the information exchanged and the "structure" of the "luxury hotel" industry supports an inference of anticompetitive effects. Opp. at 24-30. Plaintiffs' allegations on both issues are deficient.

a. The Data In STR's Reports Is Not Likely To Result In Anticompetitive Effects

Plaintiffs' Opposition relies on the false assertion that the Hotel Defendants allegedly provide to STR, and STR allegedly reports back to the Hotel Defendants, "current and forward-looking price information." Opp. at 5. But, as Plaintiffs concede near the end of their Opposition, that is not what they actually alleged. *See id.* at 26-28. Plaintiffs have only alleged that participating hotels provide STR with data regarding their rooms available, rooms booked, and total room revenue—none of which is pricing information. *See id.* at 26 (citing Compl. ¶¶ 83-89); *see also* Berman Decl. Ex. A at 3-4. In return, participating hotels allegedly receive reports that compare their performance against aggregated, averaged, and anonymized data from at least three other companies, if not more. *See* Berman Decl. Ex. A at 3, 5-6; Compl. App'x A at 91; Mot. at 4-7.

Recognizing this reality, Plaintiffs argue that "average daily rate" ("ADR") is "pricing

information," and that knowing a competitor's ADR enables a hotel "to see how much more they could charge compared to competitors." Opp. at 27. That is nonsensical. ADR is a backward-looking revenue figure that is calculated by dividing a given hotel's total room revenue for a period by the rooms sold during the same period, which results in an unweighted average across various room types for that hotel. Compl. ¶ 73. ADR does not reflect any rate that any hotel actually charged for a room (or a "realized price," Opp. at 27), nor does it reflect any rate that a hotel might charge in the future. ADR is simply one measure of a hotel's performance. Moreover, STR's reports do not provide hotels with any specific hotel's ADR. Instead, at their most granular level, STR's reports provide anonymized ADR data aggregated across at least three (if not more) hotels. *See, e.g.*, Compl. App'x A at 91. Plaintiffs do not explain how receiving historical ADR data that has been averaged and aggregated would allow a hotel to determine that it could charge more for luxury hotel rooms.

Plaintiffs also suggest that STR's Revenue Per Available Room ("RevPAR") Positioning Matrix Report "reveals competitors' pricing information," but that is at odds with Plaintiffs' actual allegations. Opp. at 27-28 (citing Compl. ¶¶ 93-94). According to the Complaint, the RevPAR Positioning Matrix Report consists of four quadrants, with an ADR Index on the vertical axis and an Occupancy Index on the horizontal axis, and anonymized dots indicating where members of a hotel's competitive set fall on the matrix. Compl. ¶ 94. The figure in the Complaint plainly shows no hotel's "pricing information," but instead provides a visual representation of the relative ADR and occupancy rate performance of properties in a comp set, without identifying the names of any hotel or the scales of the graph. *Id.* ¶ 94, n.86.

Plaintiffs further argue that STR's data is not sufficiently aggregated because it is supposedly from "small subsets of competitors" and because hotels can "deanonymize STR data and link it to particular competitors . . . ." Opp. at 29. But again, that is not what the Complaint alleges. Plaintiffs have only alleged that if two hotels are "partner[ing]" and make a "strategic selection of custom cuts," it might theoretically be possible for them to deanonymize STR's data. Compl. ¶ 22. Plaintiffs have not alleged that any Hotel Defendants have "partnered" with each other or successfully deanonymized any hotel's data. Plaintiffs thus have failed to plausibly allege

STR's reports include the type of competitively sensitive information that courts have found likely to cause anticompetitive effects. *See Local TV Ads,* 2022 WL 3716202, at *3-5 (dismissing information-sharing claim where reports did not identify "particular parties, transactions, and prices").

b. Plaintiffs Have Not Plausibly Alleged That The Structure Of The "Luxury" Hotel Industry Makes It Conducive To Anticompetitive Effects

Plaintiffs have also not plausibly alleged that the "luxury hotel industry" is highly concentrated, that luxury hotel rooms are "fungible," or that demand is "inelastic," such that anticompetitive effects can be inferred from the structure of the market. *See* Opp. at 24-26.

Market concentration. Plaintiffs argue that the "luxury hotel industry" is highly concentrated because, during their proposed "class period," the Hotel Defendants and their alleged co-conspirators supposedly controlled "an average 70% share" of that industry. Opp. at 24 (citing Compl. ¶¶ 25, 192). Plaintiffs say that they allege the Hotel Defendants "control" their brands and franchisees, Opp. at 20, but the Complaint nowhere alleges the Hotel Defendants control the pricing or operations of all of the hotels operating under their brands and franchises. Nor do Plaintiffs attempt to address Defendants' argument that they have improperly lumped all Defendants' and their Co-Conspirators' market shares across all U.S. markets, and have not demonstrated that any one of the 15 geographic markets at issue in this litigation is actually "highly concentrated." Mot. at 25; *see Epicor Software Corp. v. Alternative Tech. Sols., Inc.*, 2013 WL 12130024, at *2 (C.D. Cal. Dec. 2, 2013) (finding plaintiffs failed to plausibly allege defendant controlled third parties such that their shares could be aggregated).[5]

Fungibility. Plaintiffs argue that luxury hotel rooms are "fungible enough" so that Hotel Defendants "could have used the exchanged information to compare their positions for coordination purposes," Opp. at 24-25, but Plaintiffs do not explain how that is so. STR's reports do not provide any information regarding specific luxury hotel ***rooms***; they provide aggregated and anonymized performance data across luxury ***hotels***. *See supra* at 3-4. Moreover, Plaintiffs'

[5] While Defendants did not challenge Plaintiffs' market allegations in their motion to dismiss, Defendants do not "concede" that Plaintiffs have adequately pled any relevant market. *See* Opp. at 4, 23.

labeling of "luxury" hotel rooms as "fungible enough" is at odds not only with common sense, but also with Plaintiffs' allegations that luxury hotels are highly differentiated and exhibit significant non-price competition. *See* Mot. at 26-27.

Inelastic Demand. Plaintiffs contend that demand for luxury hotels is "relatively inelastic" because when booking luxury hotel rooms, "travelers must secure accommodations regardless of price changes," Opp. at 25-26, but that too defies common sense, and in any event, it is not alleged in the Complaint. Nor have Plaintiffs explained why purchasers of "luxury" hotel rooms, who Plaintiffs concede can and do book arrangements far in advance, could not "abstain from purchasing . . . for some period of time." *Id.*

Plaintiffs thus have not plausibly alleged the "luxury hotel industry" has structural features that make any alleged information exchange likely to have anticompetitive effects.

C. Plaintiffs Fail To Plausibly Allege Antitrust Injury

Plaintiffs still have not explained how the Complaint plausibly connects the alleged information exchange to higher prices for "luxury" hotel rooms. Plaintiffs' theory of harm is that "there is widespread usage of hotel revenue management algorithms in the hospitality industry," Compl. ¶ 141; those "revenue management systems are fed with vast amounts of data," *id.*; and that data from STR is, at most, one of many inputs that is supposedly "propelling pricing algorithms towards the ultimate goal of charging higher prices." *Id.* ¶ 150. Plaintiffs do not plausibly allege that STR data—among "vast amounts of" other inputs—caused Plaintiffs to pay allegedly higher prices for "luxury" hotel rooms.

Plaintiffs are also wrong that this issue cannot be addressed at the pleading stage. Indeed, causation is a fundamental element of an antitrust claim, and Plaintiffs do not address the cases that Defendants cited where courts have dismissed claims for failing to plausibly allege a causal link between the allegedly anticompetitive conduct and the higher prices plaintiffs supposedly paid. Mot. at 28-29 (collecting cases). The sole case on which Plaintiffs rely—*Knevelbaard Dairies v. Kraft Foods, Inc.*—is irrelevant. *See* Opp. at 32. There, the Ninth Circuit found that the plaintiffs had sufficiently pled they had been harmed by the defendants' alleged price-fixing conspiracy, and refused to credit defendants' arguments for how plaintiffs could have avoided that

injury, finding that the dispute regarding causation could not be decided on the pleadings. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989-90 (9th Cir. 2000). Here, in contrast, Plaintiffs have ***not*** sufficiently alleged that the purported conspiracy is causally connected to the injury that Plaintiffs claim to have suffered, *i.e.*, paying higher prices for luxury hotel rooms, which provides an independent basis for dismissing the Complaint.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint with prejudice.

I certify that this memorandum contains 5,669 words, in compliance with the Court's May 14, 2024 Minute Order, Dkt. 89, and the Local Civil Rules.

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